

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

(Honolulu, Hawaii)

ALOHA PETROLEUM, LTD.

Employer

and

HAWAII TEAMSTERS AND ALLIED
WORKERS, LOCAL 996, AFL-CIO

Petitioner

37-RC-3900**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. 1/
3. The labor organization(s) involved claim(s) to represent certain employees of the Employer. 2/
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act. 3/
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act: 4/

All full-time and regular part-time terminal operators and clerical staff employed by the Employer at its Barbers Point facility; including confidential employees, managerial employees, guards and supervisors 5/ as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll

OVER

period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **Hawaii Teamsters and Allied Workers, Local 996, AFL-CIO**

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. **Excelsior Underwear, Inc.**, 156 NLRB 1236 (1966); **NLRB. Wyman-Gordan Company**, 394 U.S. 759 (1969). Accordingly, it is hereby directed that with 7 days of the date of this Decision 3 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. **North Macon Health Care Facility**, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Subregion 37 Office, 300 Ala Moana Boulevard, Room 7-245, Post Office Box 50208, Honolulu, Hawaii, on or before **July 29, 1999**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099-14th Street, NW, Washington, DC 20570-0001**. This request must be received by the Board in Washington by **August 5, 1999**.

Dated July 22, 1999

at San Francisco, California

/s/ Robert J. Buffin
Regional Director, Region 20

- 1/ At the hearing and in its post-hearing brief, the Employer requested that this proceeding be held in abeyance pending disposition of the unfair labor practice charge it filed against the Petitioner in case 37-CB-1437. The Employer also requested that I take administrative notice of the unfair labor practice charge and Section 11730 of the Board's casehandling Manual regarding the handling of concurrent representation and unfair labor practice cases. The Employer asserts that it has had a collective-bargaining relationship with the Petitioner for many years in a unit of delivery truck drivers who work in close proximity with the employees in the petitioned-for unit; that it has completed collective-bargaining negotiations with the Petitioner for a successor contract covering the employees in that unit but has been unable to obtain a signed copy of the agreement from the Petitioner; and that the unfair labor practice alleged has a direct effect on the facility involved in this proceeding. The Employer also asserts that decertification proceedings are handled more expeditiously than representation cases involving the certification of a labor organization in a newly-organized bargaining unit, and requests that I take administrative notice of the alleged disparity in the handling of such cases.

The Employer's motion to hold this case in abeyance pending the processing of the unfair labor practice charge is denied. At the outset, I note that the Board does not permit litigation of unfair labor practices in representation proceedings and the unfair labor practices alleged are currently under investigation. The Employer has proffered no evidence that the unfair labor practice alleged in Case 37-CB-1437 concerns conduct that would have a tendency to interfere with the free choice of the employees in the petitioned-for unit in the election directed herein. Indeed, the allegations in this charge concern a bargaining unit that is separate and distinct from the unit at issue in the instant case, and there is no allegation of coercion or interference with the rights of employees in either bargaining unit. Nor is there any evidence that the alleged unfair labor practices have had or will have an impact on the existence of a question concerning representation in the instant case. In these circumstances, the Employer's request to hold the representation case in abeyance is denied.

- 2/ The parties stipulated, and I find, that the Employer is a State of Hawaii corporation engaged in the business of retail marketing of gasoline and convenience store products from its Barbers Point, Oahu, Hawaii facility. During the twelve month period ending May 30, 1999, the Employer derived gross revenues in excess of \$500,000, and during the same period, the Employer purchased and received goods and supplies valued in excess of \$5,000 directly from suppliers located outside the State of Hawaii.
- 3/ The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
- 4/ The only issue presented herein is whether the Employer's current employee complement is sufficiently substantial and representative so as to warrant holding an immediate election. The Petitioner seeks an election in a unit comprised of all full-time and regular part-time terminal operators and clerical staff employed by the

Employer at its Barbers Point facility. The record reflects that the petitioned-for unit currently consists of three employees in the classifications of assistant terminal superintendent, administrative coordinator/terminal and assistant terminal operator. The Employer asserts that the petition should be held in abeyance or dismissed as premature because it intends to hire three additional employees in the classification of relief assistant terminal operator. The Petitioner asserts the contrary view. Ron Everett, the Employer's projects coordinator of terminal operations, was the only witness to testify at the hearing.

The record reflects that the Employer operates a petroleum distribution terminal located at Barbers Point approximately 20 miles west of Honolulu from which petroleum products are distributed to service stations throughout the island of Oahu. The facility includes nine gasoline storage tanks, nine diesel storage tanks, and a truck loading rack for tanker trucks.

Prior to March 17, 1999, the Barbers Point facility was owned by the Employer and Texaco and operated by Texaco. On that date, Texaco sold its interest in the business to U.S. Restaurants and the Employer assumed the responsibility for operating the facility.

The terminal superintendent at the Employer's facility is Rand Shannon. Shannon supervises the employees in the petitioned-for unit. The parties stipulated that Shannon is a supervisor within the meaning of the Act.

The record reflects that an employee named Diana (last name unknown) has occupied the position of administrative coordinator/terminal at the Employer's facility since March 1999. The administrative coordinator at the Employer's facility is responsible for a variety of clerical functions, including preparing monthly reports, routine memoranda and payroll records, maintaining accounts receivable and accounts payable; maintaining petroleum and supplies inventory and inventory records; purchasing and coordinating off-island delivery of purchases; coordinating travel arrangements as requested and dispatching, coordinating truck operations and maintenance. Everett testified that the administrative coordinator spends about 90% of her time in the office. According to Everett's testimony, she uses a computer in her regular duties, and generates daily written reports showing how much gasoline was loaded on the load rack; what the tank gauges and inventory controls were between the Employer and "the co-partner;" and all of the records of any pipeline receipts, any barge loading activity, and any ship receipts or transfer of product with the terminal.

The assistant terminal superintendent at the Employer's facility is Lester Nakamura. The assistant terminal superintendent is responsible for coordinating, monitoring and performing terminal maintenance activities, issuing work permits, maintaining a variety of records (facility testing, terminal petroleum inventory), receiving and transferring petroleum product by pipeline and ship/barge, conducting monthly safety

meetings, training and directing "lower level associates," identifying emergencies and assisting with transportation requirements.

The assistant terminal operator at the Employer's facility is Lloyd Linque. The assistant terminal operator is responsible for performing terminal inventory functions and terminal maintenance activities, receiving and transferring petroleum product by pipeline and ship/barge, performing accurate facility testing, and responding to emergency situations. In addition, Everett testified that all three employees have some undisclosed responsibility for security functions at the facility during working hours. The three petitioned-for employees work Monday through Friday, from approximately 5:00 a.m. to 3:30 p.m.

According to Everett, at the time it took over operations at the Barbers Point facility, the Employer contracted with an outside agency to provide janitorial and after-hours security services at the facility. These personnel report to the assistant terminal superintendent or to the terminal superintendent. Everett testified that the sub-contracted services would be terminated when the three relief assistant terminal operators are hired in late July or early August.

Everett also testified that, at the time it took over operations at the Barbers Point facility, the Employer planned to increase the personnel at the facility in order to operate the terminal on a 24-hour basis and that the Employer plans to hire three persons in the classification of relief assistant terminal operator by late July or early August 1999. The record reflects that the Employer published newspaper advertisements for "Relief Assistant Terminal Operators" on June 13 and 20, 1999. As of the date of the hearing, about 25 applicants had applied for the position and Everett and Human Resources Director Ikeda were conducting interviews. Although the record reflects that no one had been offered a position at the time of hearing, Everett testified that it was likely that at least one of the 25 applicants would be hired.

Everett testified that the relief assistant terminal operators will take over the responsibilities of the security personnel who are currently subcontracted through an outside contractor. They will work under the supervision of Terminal Superintendent Shannon. The duties of the relief assistant terminal operators will include walking the tank farm, making sure that valves, pipeline and other equipment are in proper working order, assisting in truck loading rack operations, and responding to emergencies such as spills. The relief assistant terminal operators will also have "safety check" duties and responsibilities including surveying the facility three times during a shift and ascertaining that the tank farm and battery limits of the terminal are secure; checking valves, piping, tank configuration, and berms; and checking for leaks and for any intrusion within the fence line to the terminal. If a problem arises, the relief assistant terminal operators will contact the assistant terminal superintendent or the terminal superintendent. They may also have some reporting responsibilities to the proper agencies.

The relief assistant terminal operators are not expected to have the same level of skills and abilities as the current assistant terminal operator, and will be paid a starting salary of \$10 per hour, approximately one-third less than the rate of pay for the assistant terminal operator. The record reflects that the assistant terminal operator is paid at a rate similar to that of the administrative coordinator.

The record contains the job description for the relief assistant terminal operators. The job description reflects that the relief assistant terminal operators will be responsible for quality assurance testing, calibrating and gauging functions, general maintenance and repair, housekeeping duties, inspections and security checks, after-hours transportation and dispatch, assisting in handling of ship/barge receipts and identification of emergency matters. Everett testified that while the relief assistant terminal operators will spend approximately 50% of their time in the office, they will have no responsibility for generating reports but will provide information concerning gauging and monitoring of receipts.

Everett testified that, with additional work experience and training, it is anticipated that if the incumbent personnel were to vacate their positions, the relief personnel may be able to transfer into the assistant terminal operator, assistant terminal superintendent and/or administrative coordinator positions. However, the relief operators, at the time of their hire, would be unable to transfer into any of the existing job classifications.

Analysis: As noted above, the Employer contends that the petition should be dismissed or held in abeyance because it intends to expand its work force by adding 3 relief assistant terminal operators within the next few months. The Petitioner asserts that the petition should not be dismissed because the Employer currently has a substantial and representative complement of employees.

In cases involving an initial representation election where an employer is expanding and/or relocating its work force, the Board applies the substantial and representative complement rule in order to determine the appropriate time for an election. See *NLRB v. AAA Alternator Rebuilders, Inc.*, 980 F.2d 1395 (11th Cir. 1993); *NLRB v. The Asbury Graphite Mills, Inc.*, 832 NLRB 40, 42 (3d Cir. 1987). As stated by the Board in *NLRB v. The Asbury Graphite Mills, Inc.*, 832 NLRB at 42:

“The Board will hold an election if the present employee complement is both substantial and representative of the employer’s projected future work force. [Case cites omitted]. The rule represents an effort to balance ‘the objective of insuring maximum employee participation in the selection of a bargaining agent against the goal of permitting employees to be represented as quickly as possible.’ [Cites omitted]

The Board's determination of whether a given unit is substantial and representative of a projected future work force is said to depend on the size of the employee complement on hand at the time of the hearing, the time expected to elapse before a full complement is on hand, the rate and certainty of the projected expansion, and whether the projected additional jobs represent separate and distinct skills or functions. [Case cites omitted]"

As noted above, the record shows that at the time of the hearing, the Employer employed 3 employees in the petitioned-for unit; that it intended to retain those employees in employment; and that it planned to hire 3 additional employees by the end of July or early August, 1999. I find that the Employer's present complement of employees is substantial and representative of its projected workforce. The record reflects that the current employees are principally assigned to the day shift. While each of the employees has a separate and distinct job title and job description, they essentially perform duties that are clerical in nature. The three employees the Employer plans to add by the end of July or early August are in the new classification of relief assistant terminal operator. The record reflects that after the new employees are hired, the Employer will continue to operate its business in essentially the same fashion and that the current unit employees will provide essentially the same services as they now do. The only change in the Employer's operation that will result from the new hires is that the currently sub-contracted security and janitorial services will be performed by the new employees and the Employer will expand its operations to provide for receipt and distribution of petroleum products on a 24 hour basis.

In these circumstances, I find that conducting an immediate election will not unreasonably disenfranchise a substantial number of employees. As the Employer's employee complement time of the hearing represents 50% of its intended employee complement, I find that this complement is sufficiently representative and substantial to warrant holding an immediate election. See, Endicott Johnson de Puerto Rico, 172 NLRB 1676 (1968) where the Board found a workforce consisting of 200 employees in 115 assigned job classifications to be a substantial and representative complement of a planned expansion to 500 employees in 250 job classifications. Accord, Clement-Blythe Cos., 182 NLRB 502 (1970), enfd. 77 L.R.R.M. 2373 (4th Cir. 1971). See also, Toto Industries (Atlanta), 323 NLRB 645, 645 (1997).

- 5/ In its post-hearing brief, the Employer asserted that because Assistant Terminal Superintendent Lester Nakamura substitutes for Terminal Superintendent Rand Shannon, whom the parties stipulated is a statutory supervisor, Nakamura may be also be a statutory supervisor and should therefore be permitted to vote subject to challenge.

Everett testified that Assistant Terminal Superintendent Nakamura substitutes for Terminal Superintendent Shannon when Shannon is absent and that Nakamura

possess the same authority as Shannon during these periods. However, the record contains no evidence regarding how often Nakamura substitutes for Shannon, the type of authority Nakamura has been told he possess when substituting for Shannon or the type of authority Nakamura exercises on these occasions. In these circumstances, Nakamura shall be permitted to vote subject to challenge.

347-8020-4000-0000